

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal Number 4:93cr14WC
PAUL B. CLARK,	)	
	)	Violation:
Defendant.	)	15 U.S.C. § 1

UNITED STATES' RESPONSE IN OPPOSITION  
TO DEFENDANT'S MOTION FOR A BILL OF PARTICULARS

The defendant, Paul B. Clark, has filed a motion in essence asking that the Court order the Government to provide him with details of the evidence it may seek to introduce at trial and to preview the theory upon which the Government may argue its case to the jury. In so moving, the defendant abuses the legitimate purpose of a bill of particulars. More important, the defendant has failed to advise the Court that he already has much of the information he is requesting. Specifically, the defendant has not told the Court the following:

(1) The United States has complied substantially with the Discovery Order in this case and with Fed. R. Crim. P. 16(a), and has made available to the defendant for his inspection and copying forty (40) file drawers of documents subpoenaed from nine (9) dairy companies, including Flav-O-Rich, Inc., the defendant's

former employer. The defendant has in fact inspected the documents, and has made copies of many of them.

(2) On September 13, 1993, the United States informed the defendant by letter, a copy of which is attached, of the specific counties in eastern Mississippi that were affected by the charged conspiracy, specifying the four school districts that Flav-O-Rich won pursuant to the defendant's agreement with his co-conspirators. Also in that letter, the Government informed the defendant of the date when he joined the conspiracy.

(3) Defendant has long had in his possession the transcripts of depositions given to the State of Mississippi in connection with its civil investigation of bid rigging by Mississippi dairies. Defendant has, for example, the depositions of J.R. Dickinson and Paschal J. Miles, two employees of Dairy Fresh Corp. who have pled guilty to participating in the charged conspiracy. Those transcripts detail much of the charged conspiracy's operation, its means and methods, its participants, and the defendant's role in the conspiracy.

Furthermore, five individual and three corporate defendants have entered guilty pleas to participating in the charged conspiracy, and in each case the United States has filed with the

Court a memorandum detailing what the Government's evidence would have shown had any of the cases gone to trial. With the information contained in the indictment, the discovery he has been provided by the United States, the depositions from the State of Mississippi's lawsuit, and the evidentiary memoranda filed in the related federal cases, defendant has more than ample information to meet his avowed need for a bill of particulars "to adequately prepare a defense, to avoid prejudicial surprise at trial, and to clarify the issues for trial." Defendant's "Memorandum of Authorities In Support of Motion for Bill of Particulars" at page 1. Defendant's motion is in reality an effort to discover the Government's evidence and theories and to restrict the Government's proof at trial. Those are not proper goals for a bill of particulars, and the defendant's motion should therefore be denied.

#### ARGUMENT

The purpose of a bill of particulars is, inter alia, to inform a defendant of the charge against him in sufficient detail that he may prepare a defense and minimize surprise at trial. United States v. Gordon, 780 F.2d 1165, 1172 (5th Cir. 1986). Correctly used, a bill of particulars "clarifies" or "amplifies"

an indictment when the indictment does not advise a defendant of the charge with enough specificity to enable him to prepare a defense and minimize the danger of surprise at trial. See United States v. Johnson, 575 F.2d 1347, 1348, (5th Cir. 1978), cert. denied sub nom. Harelson v. United States, 440 U.S. 907 (1979); United States v. Cuesta 597 F.2d 903, 920, (5th Cir.), cert. denied sub nom. Patterson v. United States, 444 U.S. 964 (1979); United States v. Tallant, 407 F.Supp. 878, 890 (N.D. Ga. 1975). When the defendant's demand for a bill of particulars is directed at the Government's evidentiary proof, however, as this defendant's motion clearly is, "rather than to a clarification of the indictment . . . [the motion] cannot be granted[.]" Tallant, 407 F.Supp at 890.

The indictment in this case is very clear. It charges the defendant with a one-count violation of Section 1 of the Sherman Act; despite charging only one count, the indictment runs seven pages in length. It states when the charged bid-rigging conspiracy began and when it ended. It states the purpose of the conspiracy. It sets forth the substantial terms of the conspiracy and provides examples of the means and methods employed by the conspirators to carry out the illegal agreement.

It defines the geographic area affected by the conspiracy. It describes the manner in which the defendant and his co-conspirators operated within interstate commerce and the way in which their activities had a substantial effect on interstate commerce and were within the flow of interstate commerce. The indictment in this case meets the established standards for antitrust indictments, and more than adequately apprises the defendant of the charge against him so that he can prepare for trial and avoid unfair surprise there. See United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1081-82 (5th Cir.), cert. denied, 437 U.S. 903 (1978).

To supplement the indictment, the Government has voluntarily told the defendant the time when the evidence shows he joined the conspiracy, and has given him a listing of the counties affected by the charged conspiracy, going so far as to enumerate the four school districts in eastern Mississippi where Flav-O-Rich, pursuant to the defendant's agreement with his co-conspirators, was the winning bidder. In addition, the Government has made available to the defendant all of the documents from which it will draw its trial evidence, in compliance with the Discovery Order and with Fed. R. Crim. P. 16(a). The defendant has

transcripts of depositions taken in connection with the State of Mississippi's civil investigation of bid rigging in Mississippi, including the deposition of a co-conspirator who dealt directly with the defendant. Finally, the defendant has available to him the evidentiary memoranda the Government has filed in connection with the eight guilty pleas that have resulted from the federal investigation into school milk bid-rigging. In short, this defendant has all the information to which he is presently entitled--indeed, he has more than that--and it is well established that when the defendant has received "everything and perhaps more than he [is] entitled to before trial," no bill of particulars is required. United States v. Sullivan, 421 F.2d 676, 677 (5th Cir. 1970); United States v. Marrero, 904 F.2d 251, 258 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 111 S.Ct. 561 (1990).

A defendant should not resort to a bill of particulars as a discovery device to "'obtain a detailed disclosure of the government's evidence prior to trial.'" United States v. Kirlian, 566 F.2d 979, 985 (5th Cir.), cert. denied, 439 U.S. 997 (1978)(quoting United States v. Perez, 489 F.2d 51, 70-71 (5th Cir.), cert. denied sub nom. Hamilton v. United States, 417 U.S. 945 (1974)). Defendant seeks to do precisely that, however, and

is attempting to disguise as a request for a bill of particulars a set of interrogatories to the Government. See United States v. Kenny, 462 F.2d 1205, 1212 (3d Cir. 1972), cert. denied sub nom. Kropke v. United States, 409 U.S. 914 (1974).

Defendant makes twenty-one evidentiary demands in his motion. Half of these demands are for evidence of overt acts. Six of the demands explicitly ask for evidence of acts. See paragraphs 1(b), 1(d), 1(h), 6(c), 7(b), and 9. The remaining five ask for them implicitly. See paragraphs 1(f), 2(b), 3, 4, and 10. Defendant is not entitled to this evidence for two reasons.

First, in any conspiracy case, "there is no general requirement that the government disclose in a bill of particulars all the overt acts it will prove in establishing a conspiracy charge[.]" United States v. Murray, 527 F.2d 401, 411 (5th Cir. 1976); see also Kirlian, 566 F.2d at 985. Second, in a conspiracy prosecution under the Sherman Act, the Government has no obligation to prove that the conspirators committed any acts in furtherance of the conspiracy. A Sherman Act conspiracy is unique in that the illegal agreement, and that agreement alone, constitutes the complete offense. See United States v. Socony Vacuum Oil Co., 310 U.S. 150, 224-25 n.59 (1940); Nash v. United

States, 229 U.S. 373, 378 (1913). Defendant's demands for information about overt acts, therefore, are made solely to obtain the Government's evidence, which is an impermissible use of a bill of particulars.

That the defendant is attempting to use a bill of particulars as "a general investigative tool for the defense" and as a means "to compel the government to detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial" is very clear from two more demands in defendant's motion. United States v. Persico, 621 F.Supp. 842, 868 (D.C.N.Y. 1985); United States v. Burgin, 621 F.2d 1352, 1359 (5th Cir.), cert. denied 449 U.S. 1015 (1980). Paragraph 1(g) of the motion asks for "[a]ny and all documentation supporting and/or relating to the alleged conspiracy"; similarly, paragraph 5 asks for a description of "any documents supporting or tending to support the allegation that co-conspirators agreed to refrain from submitting bids." The defendant has pored over the same documents that the Government used in its investigation. The Government is not obliged to put together the defendant's case for him, and reveal its own case in the process. What another district court has said about similar requests in a bill of



particulars applies with equal force to this case:

It appears as though this is a case where the defendant[] either ha[s] in [his] possession or ha[s] been promised virtually all the information to which the government is privy and the motion is merely an attempt to compel the government to synthesize and correlate the information in a comprehensible format. Reasonably diligent efforts by the defendant[] should, however, net the same result.

United States v. Deerfield Spec. Papers, Inc., 501 F.Supp 796, 810 (E.D. Pa. 1980).

In five more demands, the defendant asks that the Government be required to furnish names and addresses of the defendant's co-conspirators (paragraphs 1(a) and 7(a)), the names and addresses of the public schools and institutions affected in the conspiracy (paragraphs 2(a) and 7(a)), the names and addresses of all institutions for which rigged bids were submitted (paragraph 6(a)), and the names and addresses of all persons involved in submitting bids to those institutions (paragraph 7(b)). From the discovery materials he already has, the defendant knows full well who the unindicted co-conspirators are. In any event, the Government is only obligated to provide the defendant with the names of unindicted co-conspirators whom the Government intends to use as witnesses at trial. United States v. Barrentine, 591 F.2d 1069, 1077 cert. denied, 444 U.S. 990 (1979). If none

should testify, then as long as the Government can prove the illegal agreement, the defendant can be convicted of the charge against him "despite the names of his co-conspirators remaining unknown." United States v. Rey, 923 F.2d 1217, 1222 (6th Cir. 1991). The defendant's demand for the identification of the school districts, institutions, and the names of the people who submitted bids to the institutions is information he can discern from the discovery materials he already has or to which he has access. Once again, he is not entitled to have the Government put together his case for him.

Finally, defendant's request that the Government state whether the illegal agreement was oral or written is also directed at the Government's evidence, and not at any clarification of the indictment. A Sherman Act conspiracy may be formed, as may all other conspiracies, by an express or implied agreement. See, e.g., United States v. MMR Corp., 907 F.2d 489, 495 (5th Cir. 1990). The defendant knows from the indictment and from the other information the Government has provided that in the spring of 1985, he joined an ongoing conspiracy that had been formed at least as early as 1977. Whether that conspiracy was created formally or informally, expressly or implicitly, by

written contract or by oral agreement, is irrelevant.

That defendant's demands are impermissibly broad is evidenced by his marshalling of only two cases to support his motion, neither of which is from the Fifth Circuit, and the most recent of which is twenty-seven years old. Notwithstanding that, United States v. Tolub, 187 F.Supp 705 (E.D.N.Y. 1960) echoes the rulings of other courts: that, "except to the extent necessary to fulfill these functions [of enabling the defendant to prepare a defense, avoid surprise, and plead double jeopardy], the government is not required to make full disclosure of the evidence which it hopes to adduce at trial, or of the legal theories upon which it intends to rely." Id. at 710.

Defendant's reliance on United States v. American Oil Co., 259 F.Supp. 851 (D.N.J. 1966), is also misplaced. First, the district court in that case referred to the "non-specific character of the indictment" in ordering the Government to respond to certain demands. Id. at 854. Second, even the Third Circuit, the Circuit in which the American Oil case was tried, recognizes that a "request for the 'when, where and how' of any overt acts not alleged in the indictment [is] tantamount to a request for 'wholesale discovery of the Government's evidence,'

which is not the purpose of a bill of particulars[.]" United States v. Armocida, 515 F.2d 49, 54 (3d Cir.), cert. denied sub nom. Gazal v. United States, 423 U.S. 858 (1975).

This defendant approaches trial with a wealth of information already available to him. His motion for a bill of particulars is an effort to discover the Government's case by demanding evidentiary detail about every conceivable aspect of the operation of the charged conspiracy. That purpose is beyond the legitimate scope of a bill of particulars, and the defendant's motion should, accordingly, be denied.

Respectfully submitted,

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